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United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Occidental Construction Company, a Corporation,
Plaintiff in Error,
vs.
United States of America,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

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STATEMENT OF THE CASE.

As stated by the plaintiff in error on page 1 of his brief, this action is brought under the provisions of the Tucker Act. Section 7 of that act provides—

> "That it shall be the duty of the court to cause a written opinion to be filed in the cause, setting forth the specific findings by the court of the facts therein and the conclusions of the court upon all questions of law involved in the case, and to render judgment thereon. If the suit be in equity or admiralty, the court shall proceed with the same according to the rules of such courts."
>
> U. S. Statutes at Large, p. 506, Sec. 7, of an Act of Congress March 3, 1887.

It is not necessary, therefore, that the defendant in error comment upon the statement of facts by the plaintiff in error, or make a like statement, as "The facts found by the trial court are in the nature of a special verdict and not reviewable in the Appellate Court. That court will only inquire whether the judgment below is supported by the facts thus found."

United States v. Chase, 155 U. S. 489;
District of Columbia v. Barnes, 197 U. S. 146;
Collier v. U. S., 173 U. S. 79;
Mahan v. United States, 14 Wall. 109.

Defendant in error believes that the findings of fact by the District Court is a full and concise statement of the case that needs no restatement.

ARGUMENT.

I.

It is very difficult to determine whether counsel for plaintiff in error in his brief predicates his argument upon the express contract, an implied contract, or both. The contract involved in the case at bar is required by statute to be in writing, and it is well settled that such statutes are mandatory and unenforcible, unless statutory requirements are met.

Revised Statutes U. S., Sec. 3744;
Clark v. U. S., 95 U. S. 539;
Oakley v. Goodnow, 118 U. S. 539;
St. Louis Hay etc. Co. v. U. S., 191 U. S. 159;
Bowe v. U. S., 42 Fed. 761, 781;
U. S. v. Anderson, 207 U. S. 229, 243.

The trial court has found [Tr. fols. 176, 177] that "Neither the said Schank nor the said Coultis had authority to make, execute or deliver the contracts set out in Exhibits 'A' and 'B' annexed to plaintiff's petition, nor either of them. There was no ratification of said written contracts, or either of them, on the part of the United States. There was no estoppel against the United States to deny the validity of such written contracts, or either of them."

If there be, therefore, any basis for the claims of the plaintiff in error, it must be outside the alleged written contract. Plaintiff in error refers to an implied contract.

First, considering the proposition of the plaintiff in error in his brief, pages 10 to 22, and covering the second and third assignments of errors: "United States are liable for injuries to mules, while mules were in their actual possession." [P. 10.] Where is the implied promise by the defendant in error to indemnify the plaintiff in error against the negligence of the agents and employees of the former?

It is, first of all, well established that the United States is not liable for the torts of its officers, agents and employees.

Bigby v. U. S., 188 U. S. 400;
Gibbons v. U. S., 75 U. S. 269;
Lanford v. U. S., 101 U. S. 341;
Hill v. U. S., 149 U. S. 593;
Robertson v. Sichel, 127 U. S. 507;
Schillenger v. U. S., 155 U. S. 163.

The reason for such a rule is well stated in Robertson v. Sichel, *supra,* at page 515:

> "The government itself is not responsible for the misfeasances or wrongs or negligence or omissions of duty of the subordinate officers or agents employed in the public service, for it does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs, since that would involve it in all its operations in endless embarrassments and difficulties and losses, which would be subversive of the public interests."

Also in Bigby v. U. S., *supra,* at page 407, after discussing a long line of decisions:

> "It thus appears that the court has steadily adhered to the general rule, that without its consent given in some act of Congress, the government is not liable to be sued for the torts, misconduct, misfeasance or laches of its officers or employees. There is no reason to suppose that Congress has intended to change or modify that rule. On the contrary, such liability to suit is expressly excluded by the Act of 1887."

In the next place, defendant in error contends that there must be an express written consent before this liability can be created. As stated in Bigby v. U. S., *supra:* "Without its consent given in some act of Congress, the government is not liable to be sued for the torts, misconduct, misfeasances or laches of its officers or employees." Revised Statutes of the United States, Sec. 3744, provides that such consent must be in writing.

Not only was there no express consent to waive tort liability, but there was also no implied consent. The

latter is construed from the surrounding facts, attending circumstances, relationship of the parties, etc. The plaintiff in error was informed by the agent of the defendant in error that he had no authority to contract as to the care of the mules. [Tr. fol. 154.] Plaintiff in error also knew that it was dealing with the United States Government and is presumed to know that the latter was exempt from tort liability. From these facts, where is the inference that there is any such implied consent as the plaintiff in error claims?

Plaintiff in error in his brief, at the bottom of page 16, contends that: "Since the obligation is one that arose out of an implied contract, the vital and determining fact is that the contract had been broken." And the defendant in error raises the query: What contract had been broken? From the facts as found by the trial court and from the relationship of the parties and the fact that the government is a party, defendant in error fails to see wherein the government consented to waive its exemption from tort liability, and agree to indemnify the plaintiff in error against the negligence of the defendant in error's agents and employees.

Plaintiff in error has cited, on page 13 of his brief, "A long line of cases, in which it is held that the United States is liable on implied contracts." Defendant in error has examined these cases very carefully, and can find no authority for the plaintiff in error's position that the United States is liable on an implied contract, for the negligence of its agents and employees.

Plaintiff in error, on pages 13 and 14 of his brief, seems to rely a great deal upon Clark v. United States, 95 U. S. 539, and quotes from that case. Defendant in error points out that Clark v. United States, as quoted by the plaintiff in error himself on page 14 of his brief, it is specifically stated: "As negligence is not attributed to the employees of the government in this case, the loss of the vessel, as before stated, must fall on the owner." It will thus be seen that the question of negligence was not before the court in Clark v. United States. That case merely decided that: The government was liable on a *quantum meruit;* in fact, all the citations of the plaintiff in error are to the point that the United States may be liable on an implied contract for a *quantum meruit* or *quantum valebat.* That is entirely different from holding the government liable on an implied contract for the negligence of its officers, agents and employees, especially in view of the facts that the government is exempt from such liability.

The plaintiff in error has also discussed at some length, on pages 17, 18 and 19 of his brief, Bostwick v. United States, 94 U. S. 53, and seems to rely almost entirely upon this case. Bostwick v. United States is not in point. The facts may be gathered at the bottom of page 65 of the case, *supra:*

> "The contract is one by which Mr. Lovett agreed to let, and the United States to hire the premises described, for the term of one year, with the privilege of three, at a rent of $500.00 a month, and without restriction as to the use to which the property might be put. The United

> States agreed to nothing in express terms, except to pay rent and hold for one year, but in every lease there is, unless excluded by the operation of some express covenant or agreement, an implied obligation on the part of the lessee to so use the property as not unnecessarily injure it. * * * This implied obligation is part of the contract itself, as much so as if incorporated into it by express language. It results from the relation of landlord and tenant between the parties which the contract creates."

Bostwick v. United States is distinguished from the case at bar in that there was no question raised as to the authority for making the contract, that there was an express contract of a tenancy at will, which is not required to be in writing, and not an implied contract, and that the relationship of the parties was landlord and tenant. Also the damages awarded were based upon a covenant not to commit waste.

The plaintiff in error further argues, at the bottom of page 20 of his brief, that: "The fact that the acts of negligence might in another view be regarded also as tortious, does not deprive the plaintiff in error of its remedy under the act. The primary obligation is contractual." And on page 12 of his brief plaintiff in error states that his action was properly brought under the Tucker Act: "For even in the case of conversion it is held that the bailor has an election and may sue in tort for the conversion or may sue in contract." And cites a number of cases. Defendant in error points out that in none of these cases was the United States a party; and also that, inasmuch as the United States is not liable for the torts of its agents

and employees, there can be no election of remedies or waiver of tort, because there is no liability upon the part of the government for a tort, and therefore nothing to elect.

II.

Plaintiff in error next contends in his brief, page 22, that: "The United States is liable for the damages caused by the taking and detention of the mules by the tax assessor," which covers the fourth, fifth, sixth and seventh assignments of error. In support of that proposition he argues (1) that, "The mules were not taxable in Arizona." (2) "The seizure of the mules was illegal, because not made in compliance with the provisions of the Arizona codes." (3) "The county assessor could not, in any event, lawfully deprive the United States of possession."

It is difficult to follow the argument of plaintiff in error. In his brief, page 26, he states that there is a combination of facts, each insufficient of itself, that exempts the mules from taxation. He also admits that there is authority for similar taxes and "Recognizes that the fact that the property was in the custody of the United States, would not in itself, exempt it from taxation by the state."

The mules in this case were taxable in Arizona.

> "There shall be levied annually, on the real and personal property within this state, a tax."
>
> Civil Code of Arizona, Sec. 4839;
>
> Sec. 1, Chap. 35, Laws of 1913.

"All property of every kind and nature whatsoever within the state, shall be subject to taxation."

Civil Code of Arizona, Sec. 4846;

Sec. 8, Chap. 35, Laws of 1913.

"The tax laws of Arizona include many goods, chattels, securities, etc., and all property of whatsoever kind and nature, whether tangible or intangible, included in the term 'real estate'."

Civil Code of Arizona, Sec. 4847.

"In respect to property which is of a tangible and corporeal nature, and so capable of having a *situs* of its own, the residence of its owner is generally immaterial, and the property is taxable where found: hence property of this character found within a given state is taxable by that state, notwithstanding the owner may be a non-resident or alien and not in any other way subject to the laws of the state."

37 Cyc. 799;

Minturn v. Hayes, 2 Cal. 590;

56 Amer. Dec. 366.

Uniformly so held in California, Colorado, Connecticut, Illinois, Indiana, Louisiana, Maine, Massachusetts, Minnesota, Missouri, New Jersey, New York, Pennsylvania, Texas, Wisconsin, Federal Jurisdiction and Canada.

And if the property be within one state, it is immaterial that it is also taxed and the tax paid in the state of the residence of the owner.

37 Cyc. 801.

Uniformly so held in Connecticut, Kansas, Massachusetts, New Hampshire, Oklahoma and California.

In the next place, property in the possession of the government or being used by the government in which the government has no ownership, is subject to taxation by the local authorities.

U. S. v. Moses, 185 Fed. 90;
Thompson v. U. P. Railway Co., 76 U. S. 579;
U. P. Railway Co. v. Peniston, 85 U. S. 5;
Baltimore Ship Building Co. v. Baltimore, 195 U. S. 375;
Gromer v. Standard Dredging Co., 224 U. S. 362.

Next, as to whether or not the seizure of the mules by the county assessor in Arizona was illegal. Admitting for the sake of argument that this seizure was illegal, it would then be a trespass. Would the United States as a bailee, be liable for such trespass?

Sanford v. Kimball, 138 Amer. State Rep. 345, at page 346, expresses the law upon the above point:

> "In an action of negligence against a bailee, not a common carrier, the general burden to prove negligence rests upon the plaintiff. If he proves the bailment and a failure to return on demand, he ordinarily makes out a *prima facie* case, and it is then incumbent on the bailee to explain the cause of refusal, as by showing a loss by fire, theft or accident. It then devolves upon the plaintiff to show that such loss was due to the negligence of the bailee. The final burden is on the bailor to prove negligence, not on the bailee to prove due care. * * *

> "It was only incumbent upon the defendant to explain the circumstances and to give the reason why the horse was not returned to the plaintiff. He need go no further. This was done, and it then became the province of the jury, under proper instructions, to determine whether or not the defendant was negligent, either in connection with the injury or in its subsequent treatment."

We have the same situation in the case at bar. The mules were taken possession of by the assessor while in the custody of agents of the defendant in error. There is no finding of fact that the defendant in error was negligent in allowing this trespass—if it be a trespass, as the plaintiff in error assumes.

Officers of the government are not presumed to be negligent.

Clark v. U. S., 95 U. S. 539.

The seizure of the mules in this case, however, was entirely legal.

It is the duty of the assessor to seize personal property and sell the same for the purpose of paying all unpaid taxes thereon.

Sec. 4872, Civil Code of Arizona.

Property in the possession of a United States officer, especially after the completion of the work on which the property was used, is subject to seizure by said officers.

U. S. v. Moses, 185 Fed. 90.

In the next place, the plaintiff in error has taken a curious position in supporting his proposition, on page 31 of his brief, that: "The county assessor could not,

in any event, lawfully deprive the United States of possession"; and this is his main contention. In the first part of his brief, defendant in error contended that the United States could not invoke its sovereignty to escape liability for the negligence of its agents, and plaintiff in error now invokes that sovereignty to warrant a recovery on grounds that he admits would not exist as against an ordinary bailee.

The argument of the plaintiff in error on this point is best stated in his own words at the bottom of page 31 of his brief: "The attribute of sovereignty in the United States precludes the acquirement or reforcement against them of many rights that may be enforced against private individuals." Apparently, the plaintiff in error admits that the county assessor in the case at bar had a legal right to assess the property in dispute, but objects to its enforcement. He then cites a number of cases and discusses them at some length, to show the priority of federal jurisdiction. This argument and these cases are not in point. The question is, was there an implied contract that the government refused to surrender property in its possession that had been legally assessed and was legally subject to seizure thereunder? We cannot, by any stretch of the imagination, conceive that the defendant in error impliedly so promised.

On page 35 of his brief, plaintiff in error cites and discusses U. S. v. Moses, 185 Fed. 90. This case is squarely in point with the argument of the defendant in error and is here submitted as authority. The best statement may be obtained from the court's opinion on pages 92 and 93 of the case. The italics are ours.

"The property in question, at the time of the assessment, was owned exclusively by the Widell-Finley Company. The government of the United States had no ownership therein, and *the mere fact that the property was employed in the service of the government did not exempt it from taxation, in the absence of an act of Congress to that effect.*

"It is true that property in the lawful possession of the United States, and in which the United States has a property interest, may not be seized by any process issued under the authority of the state. In this case, however, *the United States had no property interest in the property in question. It had a right to the possession of said property under the terms of the contract before quoted until the work required to be done by the Widell-Finley Company was completed and no longer.* That work was completed, as stated, August 31, 1907. Its possession thereafter by Walter was for and on behalf of the Widell-Finley Company, and *the mere fact that Walter was an officer of the United States, and claimed that his possession was for and on behalf of the United States, did not prevent its seizure by the sheriff as aforesaid.* To render such seizure unlawful, it must appear that the officer had a legal right to hold and retain the possession of said property for and on behalf of the United States. A mere claim of right in the government is not sufficient."

This case conclusively establishes the legality of the tax and seizure of the property in the case at bar. Rather than raise a presumption that there is an implied obligation upon the part of the government to assert its sovereignty to defeat a legal tax and legal seizure thereunder, it apparently points the other way.

It then follows that the defendant in error is also not liable for the injuries to the mules while in the possession of the county assessor of Mohave county, Arizona.

The assignments of error, other than herein discussed, viz., 2-7 on pages 7-9 of plaintiff in error's brief, are general.

The judgment of the lower court is consistent with the findings of fact, and it is respectfully submitted that it be affirmed.

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